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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NOT PRINTED

NOT PRINTED

No. ~~1486~~ 136

HAROLD WHITELEY,

Petitioner,

v.

THE WARDEN OF THE WYOMING STATE PENITENTIARY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

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June , 1970

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THE WARDEN OF THE WYOMING STATE PENITENTIARY,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit (App. 85-93) is reported at 416 F.2d 36 (10th Cir. 1969).

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on September 30, 1969. (App. 93.) The petition for certiorari was filed on December 23, 1969 and was granted (in part) on April 27, 1970. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's arrest by the Laramie police on November 24, 1964 was based on probable cause, and if not, whether the search and seizure incident to that arrest were also illegal, thereby preventing the use of the fruits thereof as evidence at petitioner's trial in 1965.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV, United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV, United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

A. Nature of Proceedings to Date

Petitioner sought habeas corpus relief in the United States District Court for the District of Wyoming in November 1967, pursuant to 28 U.S.C. 2254, alleging that he had been illegally arrested since no probable cause existed for his arrest and that as a consequence the fruits of the search and seizure incident thereto should not have been admitted

at his trial. On or about July 22, 1968 petitioner amended his petition to add two allegations which are not material to this review.

The history of petitioner's proceedings in the state courts of Wyoming prior to the initiation of federal proceedings is as follows:

(1) In December, 1964 Whiteley was charged with (a) breaking and entering, and (b) being an habitual criminal by the County and Prosecuting Attorney of Carbon County, Wyoming, and was tried in May, 1965 in the District Court of the Second Judicial District of the State of Wyoming, Carbon County, Wyoming, *State of Wyoming v. Whiteley*, Criminal No. 2885;

(2) Following a jury trial Whiteley was convicted of both of the above counts and sentenced to ten years on the first count and life imprisonment on the second count, the two sentences to run concurrently;

(3) Whiteley appealed this conviction to the Supreme Court of Wyoming (Docket No. 3461), which affirmed the judgment of the lower court, *Whiteley v. State of Wyoming*, 418 P.2d 164 (Wyo. 1966);

(4) In 1967, Whiteley, pursuant to Wyoming statutes, filed a petition for post-conviction relief in the District Court of the Second Judicial District of the State of Wyoming, Carbon County, Wyoming, *Whiteley v. State of Wyoming*, Civil No. 9402. After a hearing, this petition was denied on June 5, 1967. No appeal to the Supreme Court of Wyoming was taken from this decision.

By stipulation of the parties, this case in the United States District Court below was tried on the record before the trial court in the original case of *State of Wyoming v. Harold Whiteley*, Criminal No. 2885 in the District Court of the Second Judicial District of the State of Wyoming,

Carbon County, Wyoming, and on the record on appeal to the Supreme Court of Wyoming, Docket No. 3461.

The United States District Court below denied Whiteley's petition for a writ of habeas corpus on November 25, 1968. On appeal to the United States Court of Appeals for the Tenth Circuit this decision was affirmed on September 30, 1969.

B. Facts

After several business establishments in the town of Saratoga, Carbon County, Wyoming were broken into on November 23, 1964 (App. 42-47) the sheriff of Carbon County, acting upon a "tip" from an unnamed and unidentified informant (App. 52) executed a complaint reading as follows:

> I, C. W. Ogburn, do solemnly swear that on or about the 23rd day of November, A.D., 1964, in the County of Carbon and the State of Wyoming, the said Harold Whiteley and Jack Daley, defendants, did then and there unlawfully break and enter a locked and sealed building * * * contrary to the form of the Statute in such case made and provided against the peace and dignity of the State of Wyoming. (App. 28, State's Ex. 4)

Pursuant to this complaint a warrant of arrest was issued in Rawlins, Wyoming (App. 52), and a statewide radio broadcast (State item number 881) was then made to other law enforcement agencies by the sheriff's office. (App. 52-53, 29-38; State's Exs. 5 and 6.) The next night petitioner was arrested by a deputy sheriff of Albany County and the City of Laramie police in Laramie, Albany County, Wyoming solely on the basis of said broadcast. (App. 55-57, 59, 71-72, 17-25; State's Ex. 2.) Neither the deputy sheriff nor the Laramie police had either an arrest warrant or a search warrant in their possession. (App. 48-49, 57.)

Incident to the arrest petitioner's car was searched and incriminating personal property seized. (App. 57-59, 61-

70.) This evidence was subsequently used against petitioner at his trial. (R., Vol. IV, State's Exs. 9-16.)

Petitioner was charged with breaking and entering and being an habitual criminal.

At his arraignment (App. 15-16), and later at his trial (App. 61-62), petitioner contended that his rights had been violated by an unlawful search and seizure. Specific objection was made at the trial to the admission in evidence of the aforesaid incriminating personal property. (App. 61-62.)

ARGUMENT

PETITIONER'S ARREST BY THE LARAMIE POLICE WAS ILLEGAL, THE SEARCH AND SEIZURE OF PERSONAL PROPERTY INCIDENT THERETO WERE ALSO ILLEGAL, AND THE ADMISSION OF THE FRUITS OF THE SEARCH AND SEIZURE AS EVIDENCE AT PETITIONER'S TRIAL IN 1965 CONSTITUTED PREJUDICIAL ERROR.

Petitioner submits that the complaint (affidavit) by the sheriff of Carbon County, Wyoming, which complaint was the basis for petitioner's arrest warrant, was invalid on two counts; that, as a consequence, the warrant of arrest was likewise invalid; that petitioner's arrest, based as it was, solely on the warrant of arrest, was therefore illegal; that the search of his car following the illegal arrest and the seizure of incriminating personal property were also illegal; and finally that the admission of the fruits of that illegal search and seizure into evidence at petitioner's trial in 1965 constituted prejudicial error.

Let us begin with the sheriff's complaint. The relevant part of said complaint reads as follows:

> I, C. W. Ogburn, do solemnly swear that on or about the 23rd day of November, A.D., 1964, in the County of Carbon and the State of Wyoming, the said Harold Whiteley and Jack Daley, defend-

> ants, did then and there unlawfully break and enter a locked and sealed building * * * contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State of Wyoming. (App. 28; State's Ex. 4)

This complaint is invalid for two reasons: (1) no facts concerning the criminal acts were set forth therein as required by *Giordenello v. United States*, 357 U.S. 480 (1958) and *Aguilar v. Texas*, 378 U.S. 108 (1964), and (2) no "underlying circumstances" were alleged to indicate that the information relied upon by the sheriff in drafting said complaint came from a tip from an unidentified informer (App. 52), or that said informer was reliable. *Aguilar v. Texas, supra.*

All we can find in the sheriff's complaint are "mere conclusions" which *Giordenello* held insufficient as a ground for a determination of probable cause. There were no factual allegations in the complaint at bar to indicate that petitioner had committed the crime of breaking and entering, or, for that matter, any crime. There was no information which could have given the justice of the peace who issued the warrant for petitioner's arrest any grounds from which he could have determined that probable cause existed to believe that petitioner had committed the crime alleged in the complaint. Nevertheless, the justice of the peace issued a warrant of arrest on the authority of this defective complaint.

In *Giordenello* this Court held that a complaint which merely stated the affiant's mere conclusions couched in the words of the statute could not support a valid arrest warrant. Mr. Justice Harlan said at page 486 of 357 U.S. 480:

> *The purpose of the complaint, then is to enable the appropriate magistrate * * * to determine whether 'the probable cause' required to support a warrant exists. The Commissioner must judge for himself* the persuasiveness of the *facts* relied on by a complaining officer to show probable cause. He should

> not accept without question the complainant's *mere conclusion* that the person whose arrest is sought has committed a crime.
>
> * * * The complaint contains no affirmative allegation that the affiant *spoke with personal knowledge of the matters contained therein; it does not indicate any source for the complainant's belief;* and it does not set forth any other sufficient bases upon which a finding of probable cause could be made. (Emphasis added)

Although *Giordenello* originally appeared to rest on the federal rules of criminal procedure applicable only to federal prosecutions, *Aguilar v. Texas*, 378 U.S. 108, 112 fn. 3 (1964), made it clear that: "The principles announced in *Giordenello* derived, therefore, from the Fourth Amendment, and not from our supervisory power." The Court also stated at page 110 that since *Ker v. California*, 374 U.S. 23 (1963), had held "that 'the standard of reasonableness is the same under the Fourth and Fourteenth Amendments'" it had to be read "as holding that the standard for obtaining a search warrant is likewise 'the same under the Fourth and Fourteenth Amendments.'"

In *Barnes v. Texas*, 380 U.S. 253 (1965), a case somewhat similar to the one at bar since it also involved an arrest warrant based on a defective complaint, *Giordenello* and *Aguilar* were cited in a *per curiam* opinion as the sole basis for reversal of the decision below in *Barnes v. State*, 390 S.W.2d 266 (Texas 1964). The only factual difference between *Barnes* and this case is that here the sheriff of Carbon County who obtained the warrant of arrest did not make the arrest. He sent out a statewide radio broadcast (App. 52-53) which resulted in the arrest being made by a deputy sheriff of Albany County together with the city police of Laramie. (App. 55-57, 59, 71-72.)

The second defect in the complaint relates to its utter failure to show that the information contained therein had come from an informer and that said informer was worthy

of the sheriff's reliance. In this area, as in the former, this Court has laid down strict guidelines for both federal and state courts, as well as federal and state law enforcement personnel, to follow. In *Draper v. United States*, 358 U.S. 307 (1959), it was held that while an informant's identity need not be disclosed, the Court would closely scrutinize the record to see that in fact the informant was a sufficiently reliable source so as to justify reliance by the police on the information supplied by the informant. The Court then dilligently went through the history of the relationship between the informant and the police agents before affirming that there indeed the police were acting on probable cause. See, also *Jones v. United States*, 362 U.S. 257 (1960), where an affidavit based on hearsay of an informer was held valid because *inter alia* the informer was reliable and this fact was included in the affidavit.

And in *Aguilar v. Texas*, 378 U.S. 108, 114, 115 (1964), this Court made clear for all county attorneys, sheriffs' offices and justices of the peace that informers had to be reliable and this fact had to be included in the complaint or affidavit submitted as a basis for issuing a warrant:

> * * * although an affidavit may be based on hearsay information and need not reflect the direct personal observation of the affiant * * * the magistrate must be informed of [1] some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were and [2] some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, * * * was 'credible' or his information was 'reliable.' Otherwise, the 'inference from the facts which lead to the complaint' will be drawn not by 'a neutral and detached magistrate,' as the Constitution requires, but instead by a police officer 'engaged in the often competitive enterprise of ferreting out crime.' *Giordenello v. United States.*

In *Beck v. Ohio*, 379 U.S. 89 (1964), the conviction of petitioner was reversed due to the failure of the State to prove the existence of probable cause "at the moment of arrest." Mr. Justice Stewart, writing for the majority, at page 97, added:

> * * * But when the constitutional validity of that arrest was challenged, it was incumbent upon the prosecution to show with considerably more specificity than was shown in this case what the informer actually said, and why the officer thought the information was credible.

Again in *McCray v. Illinois*, 386 U.S. 300 (1967), this Court discussed the need for the informant to be reliable in order for probable cause to exist. McCray was arrested, without a warrant, in Chicago for possession of narcotics. The arrest was made on the basis of a conversation with an unidentified informer who had told the two officers that McCray was selling narcotics and had narcotics on his person and that he could be found in a specific vicinity. The officers proceeded to this locale, saw McCray and then arrested him. In the search incidental to arrest heroin was discovered on McCray's person.

Defendant moved to suppress the evidence and at the hearing Officer Jackson testified on direct examination that he had known the informant for about a year, that during this period he had received information about narcotics about 15-16 times from said informant, that the information had been accurate and had resulted in numerous arrests and convictions. On cross-examination Jackson refused to identify the informant and the Court sustained the objection. Officer Arnold testified, on direct, to substantially the same facts, adding that the informant had *actually observed* McCray selling narcotics.

McCray's conviction was affirmed and it was held that in a hearing on a motion to suppress the informer's identity need not be revealed unless the magistrate has reason to doubt the police officer's credibility. But the significance

of *McCray* to petitioner in this case may be found in the Court's re-affirmance of the need for the existence of underlying circumstances indicating not only (1) that a crime had been or was being committed by a particular person, but also (2) that the informer was credible and reliable.

It is clear then that *McCray* requires on the part of officers making an arrest without a warrant knowledge of the underlying circumstances relating to both probable cause concerning the crime, as well as the informer's reliability. And, of course, when warrants are sought, whether they be search or arrest warrants, such underlying facts must be set forth in the affidavit submitted to the magistrate or justice of the peace.

The rule of the foregoing cases may be summarized as follows: a tip from an unidentified informer cannot be the basis for an arrest warrant unless the police officer alleges in his complaint that he has received information from this same informer on prior occasions and that said information has always been reliable. *Draper, Jones, Beck,* and *McCray, supra.*

In this instance, the complaint not only fails to allege that the informant, who was the source of the sheriff's information, had been reliable in the past, but does not even indicate that an informant existed. From a reading of the complaint it would appear that the *sheriff* was the source of the allegations contained therein.

Both strands of the probable cause wire were brought together in a single capstone decision in *Spinelli v. United States,* 393 U.S. 410 (1969), when this Court, relying on *Aguilar,* reversed petitioner's conviction. Not only did the affidavit which served as the basis for a search warrant offer no ground for the conclusion that affiant's confidant was "reliable," but the affidavit also failed on a second count. Mr. Justice Harlan, speaking for the majority, put it in the following language at page 416.

> * * * Perhaps even more important is the fact that *Aguilar's other test* has not been satisfied. The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI's source received his information—it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable. Compare *Jaben v. United States*, 381 U.S. 214 (1965). In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail so that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation. (Emphasis added)

So, it is now quite clear that the underlying facts—both as to the unidentified informer's reliability and the criminal conduct itself—must be set forth in the police officer's affidavit used as a basis for the issuance of either a search warrant or an arrest warrant. And, this is especially important: it is of no consequence that the agents might have had additional information which could have been given to the Commissioner. "It is elementary that in passing on the validity of the warrant, the reviewing Court may consider *only* information brought to the magistrate's attention." *Aguilar v. Texas*, 378 U.S. 108, 109 fn. 1 (1964) (emphasis in original).

Thus, it is clear that the State of Wyoming has never proven that probable cause actually existed at the time the warrant of arrest was sought. And, of course, the burden is on the state to prove the existence of probable cause. *Cervantes v. United States*, 263 F.2d 800 (9th Cir. 1959); *United States v. Rivera*, 321 F.2d 704 (2nd Cir. 1963); *Thompson v. White*, 406 F.2d 1176 (5th Cir. 1969).

Three courts, namely, the Supreme Court of Wyoming in *Whiteley v. State*, 418 P.2d 164, 167 (Wyo. 1966); the United States District Court for the District of Wyoming in *Whiteley v. State of Wyoming*, 293 F.Supp. 381, 387 (D. Wyo. 1968); and the United States Court of Appeals for the Tenth Circuit in *Whiteley v. Meacham*, 416 F.2d 36, 40 (10th Cir. 1969), have previously passed on the precise issue now before this Court and each court has made the same error, to wit: that although an arrest warrant had issued, the arrest was valid *as a warrantless arrest* based on the fact that the arresting officer had reasonable or probable grounds to suspect Whiteley of having committed a felony. At this point one thing must be made clear: the arresting officers had no independent knowledge of either the crime or of Whiteley's actions for the period from the moment said crime was committed to the moment of arrest. (App. 55-57, 59, 71-72.) So the question posed to this Court is not whether an arrest based on an invalid arrest warrant may still be valid if sufficient probable cause exists to support a warrantless arrest. The question rather is whether an arrest based on an invalid arrest warrant and without any independent basis on the part of the arresting officer to support a warrantless arrest is valid. These are two entirely different questions. Here, we have no grounds for an arrest by the arresting officer other than the radio call from the Carbon County sheriff's office, which of course was based on the invalid arrest warrant. Let us look at the facts once more. The Laramie Police (Laramie is the largest city in Albany County) received notice from the Albany County sheriff's office calling for the arrest and detention of Whiteley on the authority of a radio item placed on the state police network, which radio item had been broadcast by the sheriff of Carbon County on the authority of the warrant issued for Whiteley's arrest. The Laramie police officer who first stopped Whiteley testified on the stand that he made this arrest on the authority of a notice posted on the bulletin board at the Laramie City Police station. (App. 71.) The police did not stop Whiteley for the breach

of a traffic regulation or for any act by him in their presence. On the contrary, petitioner was stopped and arrested for only one reason, namely, a warrant of arrest had been issued by a justice of the peace in Carbon County, the sheriff's office in Albany County had been notified thereof by a radio broadcast, and that office in turn had notified the Laramie police department of said warrant. The Laramie police had no reason to stop petitioner, or to believe that he was in any manner guilty of the crime of breaking and entering other than by authority of the radio call from the sheriff's office in Carbon County.

As was demonstrated by the Second Circuit Court of Appeals in 1955, the police may make an arrest and later evidence may prove them right, but, when later challenged by an accused, they must demonstrate that originally they had probable cause to support an arrest without a warrant. "Courts cannot put a stamp of approval upon actions of the police when the officers, challenged by an accused, fail or refuse to demonstrate compliance with the rules which circumscribe their authority." *Wrightson v. United States*, 222 F.2d 556, 558 (2nd Cir. 1955). This opinion was cited with approval by the Supreme Court in *Wong Sun v. United States*, 371 U.S. 471, 480 (1963). Thus, while the Laramie police may have performed their duty as stated by the Supreme Court of Wyoming, *Whiteley v. State*, 418 P.2d 164, 167 (Wyo. 1966), it remains for the State to show that they acted upon probable cause. Obviously, the Laramie police had no reason of their own to believe that petitioner committed the crime of breaking and entering certain stores in Saratoga, Wyoming. It should be noted here that Sheriff Ogburn himself would have been unable to arrest Whiteley legally – with or without the aid of the warrant – for no crime was committed in his presence and the sole source of his information was from an informant not proven to be reliable in the past. *Draper v. United States*, 358 U.S. 307 (1959). The sheriff did testify at the trial that he acted on the basis of a tip when he executed the complaint, but he did not testify as to the identity of

said informant or that he was reliable and credible as required by the Fourth and Fourteenth Amendments to the United States Constitution as construed by this Court.

I should be noted here that the Circuit Court of Appeals below felt that the Laramie police officers had the right to rely on the state police radio bulletin broadcast by the sheriff of Carbon County since he was "known to them to be reliable" (App. 92), but if this were so then any invalid complaint or warrant of arrest could be rehabilitated merely by sending out a police radio broadcast to arrest the subject of the warrant. Not only is this not the law but another United States Court of Appeals specifically rejected such an argument in *United States v. Pearce*, 275 F.2d 318 (7th Cir. 1960). There, an F.B.I. agent had averred in an affidavit that the accused committed the crime, and that he, the affiant, had probable cause to so believe that such was true because he had received this information from a reliable informant. In that case, the court forced the government to disclose the identity of the "reliable informant" who turned out to be none other than the complaining agent's superior. The superior had received the information from another agent who had received the information from an informant not previously known to any of the series of agents, and therefore never proven to be reliable. The court held that such information which had not established itself as reliable could not form the basis for a belief by a reasonable and prudent man that the named accused was guilty of the crime charged.

Another similar case is *Thompson v. White*, 406 F.2d 1176, 1178 (5th Cir. 1969), where the Court of Appeals for the Fifth Circuit held that "information from an unknown source or a source unverified as to its consistent reliability does not establish probable cause."

In view of the foregoing it is clear that under no possible theory can this court find the existence of probable cause to support the arrest of petitioner, whether with or without a warrant. The State's warrant was defective and no fac-

tual basis existed for a warrantless arrest by the Laramie police. For an excellent discussion of this very case after the Supreme Court of Wyoming had decided it, see 2 Land and Water Law Review 477 (1967).

Once it is established that the arrest was illegal the rest of the argument falls easily into place. A search incident to an illegal arrest is itself illegal and any evidence obtained by such search and seizure is inadmissible in a state court criminal proceeding. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Beck v. Ohio*, 379 U.S. 89 (1964); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Traub v. Connecticut*, 374 U.S. 493 (1963).

At no time during these federal habeas corpus proceedings has petitioner contended that if the arrest was legal the subsequent search and seizure of contraband and burglars' tools was illegal on the ground that a search warrant should have been sought. This was due to the belief by counsel that under the posture of the law prior to *Chimel v. California*, 395 U.S. 752 (1969), the search of an arrestee's automobile – glove compartment, trunk, the entire vehicle – was permissible if he was arrested for a crime like breaking and entering and if it was likely that the fruits of such offense "might be found in the car." Modern Criminal Procedure, Third Edition, Hall, Kamisar, La Fave & Israel, page 278. We mention this particular point here for only one reason. Although we do not believe it proper to raise an issue in this Court not raised below, Whiteley is under a life sentence, and *Chimel* came down only a few weeks prior to the oral argument in the court below. Therefore, if this Court should decide against petitioner on the issue of probable cause, it may wish to consider the question as to whether *Chimel* is retroactive. For if *Chimel* is retroactive then it is submitted the search and seizure of personal property from the trunk and interior of Whiteley's automobile was illegal regardless of the validity of his arrest.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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